SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 185

IN THE MATTER OF

THE CLAIM FOR BENEFITS UNDER ARTICLE 18 OF THE LABOR LAW OF THE STATE OF NEW YORK, MADE BY SYLVIA PERRY,

Claimant-Petitioner,

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the Supreme Court, Appellate Division, is reported in 261 App. Div. 739, and is to be found at page

66 of the record. The opinion of the Court of Appeals is reported in 287 N. Y. 539, and is to be found at page 46 of the record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237 of the Judicial Code of the United States (28 U. S. C. A., § 344, subd. b), to correct error of the Court of Appeals of the State of New York, the court of last resort in that State.

III.

Statement of the Case.

The essential facts of the case herein are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated herein.

IV.

Specification of Errors.

The Court of Appeals of the State of New York erred in the following particulars:

1. In holding that Sylvia Perry, the claimant, was as a matter of law, because of the provisions of the Federal statute, an employee of the Department of Agriculture and not an employee of the respondent.

2. In reversing the order of the Supreme Court, Appellate Division, which had affirmed the decision of the Unemployment Insurance Appeal Board of the State of New York that the respondent was the employer of the claimant and that claimant was entitled to be credited with her earnings with respondent for the year 1938.

V.

Argument and Authorities in Support of Petition.

Summary of the Argument.

Point A

The New York Court of Appeals did not properly apply the provisions of the Perishable Agricultural Commodities Act of 1930, Title 7, U. S. C. A., Ch. 20-A, § 499, subds. (n) and (o), since the claimant, Sylvia Perry, was not an employee of the Department of Agriculture referred to in that statute, but a typist employed by respondent corporation.

Point B.

A substantial Federal question is involved since the Department of Agriculture and the Bureau of Internal Revenue have issued rulings which are contrary to the decision of the New York Court of Appeals.

Point A.

This Court should issue the writ in order to inquire whether the State Court has rightly applied the Federal Statute, the contract between the respondent and the Department of Agriculture and the rules of the law of master and servant in determining whether a claimant for unemployment insurance benefits in the State of New York was an employee of the United States or of a New York corporation during the calendar year 1938.

Claimant's earnings in employment subject to the New York Unemployment Insurance Law for the year 1938 governed the total amount of benefits payable during the benefit year 1939 (New York Labor Law § 507, subd. 1). Claimant maintains that her earnings of $325.00 in each of

the four calendar quarters during 1938 should be included in her 1938 earnings (R. 12).

If the claimant herein during 1938 was an employee of the United States, then we concede that her earnings from the Federal Government do not constitute remuneration as defined in § 502, subd. 6, of the New York Labor Law, since the State of New York may not impose a tax upon the United States based on such earnings. If, however, the claimant herein during 1938 was an employee of the respondent, then her earnings with it during 1938 are taxable by the State of New York and may be included as earnings in employment subject to the Unemployment Insurance Law.

The facts in the record sufficient to prove that Sylvia Perry was during 1938 an employee of the respondent have been set out in the petition under "Summary Statement of the Matter Involved" to which we respectfully refer the court.

The control over the activities of the employees of the respondent (such as the claimant herein) exercised by the inspectors occurs because the respondent requires its employees to conform to the discipline of the inspectors. This is an exercise of the respondent's right of control over its employees and does not convert its employees into employees of the United States. Claimant was paid from private funds and not from government sources. See *Standard Oil Co.* v. *Anderson,* 212 U. S. 215; *In re Batter,* 257 App. Div. 546, aff'd 282 N. Y. 722; *In re Kinney,* 257 App. Div. 496, aff'd 281 N. Y. 840; *Buckstaff Bath House Co.* v. *McKinney,* 308 U. S. 358, 60 S. Ct. 279.

The opinion of the lower court held (R. 42):

> "* * * This employee had none of the benefits incident to employment by the United States government, she was not permitted to be a member of the retirement system, she worked for the benefit of the Asso-

ciation, and received her pay from a fund made up by its members. Her selection by the Federal Bureau for the reason outlined did not affect the relation of employer and employees that existed between her and the Association."

In *Denton* v. *Yazoo & Mississippi Valley Railroad Company, et al.*, Respondents, 284 U. S. 305, this court granted a writ of certiorari where the question was whether Jim Hunter was a servant of the railroad company or of the United States Government at the time of the injury sustained by him. In the *Denton* case, *supra,* the question sought to be reviewed was whether the State court had rightly applied the provisions of the United States Postal Laws and Regulations in arriving at its decision. The question raised by your petitioners herein is whether the State court has rightly applied the provisions of the Perishable Agricultural Commodities Act of 1930, Title 7 U. S. C. A., Ch. 20-A, §§ 499 (a) to (r). Section 499 (n) thereof reads, in part, as follows:

> "Inspection of perishable agricultural commodities; employment of inspectors; fees for and expenses of inspection; travel and subsistence of inspectors; certificates of inspectors as evidence; issuance of fraudulent certificates; penalty
>
> "(a) The Secretary is hereby authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this chapter, to any interested person the class, quality and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may

prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further*, That expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this chapter: *And provided further*, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under sections 1 to 17 (a) of this title, as prima-facie evidence of the truth of the statement therein contained; * * *"

Section 499, subd. (o) of the same Act provides:

"The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, binding, telegrams, telephones, law books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and ex-

penses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto. June 10, 1930, c. 436, § 15, 46 Stat. 537."

POINT B.

The writ should be granted because a substantial Federal question is involved.

The United States Department of Agriculture on or about November 21, 1941, issued a ruling that the inspectors (other than the supervising inspector) and typists in question employed under the inspection agreement referred to in the record as employer's exhibit "B," pages 48-54, are not employees of the Department of Agriculture.

The Bureau of Internal Revenue under date of December 18, 1941, issued a ruling to the effect that the inspectors (other than the supervising inspector), typists and other personnel employed under the inspection agreement, which is printed in the record as employer's exhibit "B," pages 48-54, and the Western Perishable Carload Receivers Association of New York, Inc., Respondent, are subject to the taxes imposed by Titles VIII and IX of the Social Security Act and sub-chapters A and C of chapter 9 of the Internal Revenue Code and amendments thereto.

Thus we have presented the anomalous situation of the Court of Appeals of the State of New York holding that the

claimant herein was an employee of the United States Department of Agriculture, and the Department of Agriculture and the Bureau of Internal Revenue holding that she was an employee of the respondent herein and not an employee of the Federal Government.

We submit that while the number of persons affected by the Court of Appeals' decision may be comparatively small in New York State, nevertheless, a substantial Federal question is presented which should be reviewed by this Court, in view of the fact that throughout the entire nation this decision will affect several thousands of persons employed under similar agreements with the United States Department of Agriculture. Our research has failed to disclose that any court except the Court of Appeals of the State of New York has passed upon the question presented herein.

In *Standard Oil Company of California* v. *Charles G. Johnson, as Treasurer of the State of California,* — U. S. —, decided on June 1, 1942, this Court reversed the California court which had held that an army post exchange was subject to the California Motor Vehicle Fuel License Tax Act on the ground that army post exchanges were not "the government of the United States or any department thereof," and consequently not exempt from tax. This Court in reversing the California court specifically ruled that "post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it and partake of whatever immunities it may have under the Constitution and Federal statutes. In concluding otherwise the Supreme Court of California was in error."

We submit, therefore, that this Court likewise should review the question involved herein, whether the claimant,

Sylvia Perry, was employed by the respondent or Federal Government.

Conclusion.

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory power. The subject matter of this petition is of great importance because it affects the status of many persons employed under similar conditions as the claimant herein, and further, affects the proper administration of the Unemployment Insurance Law, not only in the State of New York, but in other jurisdictions having similar statutes.

If the conflict in opinion between the Department of Agriculture and the Bureau of Internal Revenue on the one hand, and the Court of Appeals' decision on the other continues to exist, we shall have a situation presented of the Federal government imposing Federal taxes on the respondent and the claimant because of their rulings that such employees are employees of the respondent and not of the United States; and the State of New York prevented from collecting State taxes from the respondent because of this decision of its highest court, holding in effect that the claimant was an employee of the United States and, therefore, the respondent is not liable for the unemployment insurance taxes to the State of New York measured by the wages paid to the claimant.

Furthermore, while the claimant, pursuant to the said Federal rulings is liable for the payment to the Federal government of the taxes imposed by the Federal Insurance Contributions Act (42 U. S. C. A. § 1001), by virtue of the Court of Appeals' decision herein, she is not entitled to unemployment insurance benefits based on the same services rendered on the theory that she is an employee of the United States.

We respectfully pray that this Honorable Court take jurisdiction in the premises herein and grant the writ of certiorari as herein prayed for.

Respectfully submitted,

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